No. 83-1766

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In The

Supreme Court of the United States

October Term, 1983

JONNET DEVELOPMENT CORPORATION and ELMER J. JONNET, JR.,

Petitioner,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MILTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MODEV INTERNATIONAL OF MONTREAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court, in this civil action, correctly calculate damages on the counterclaim where such calculation was premised on the pendency of certain equitable claims, where the district court had refused to allow withdrawal of such equitable claims shortly after institution of suit?

2. By awarding counsel fees and expenses against petitioners did not the district court erroneously fail to apply the "American Rule" which generally disallows the assessment of attorneys' fees against a losing party in civil litigation?

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OPINIONS BELOW

Petitioners Jonnet Development Corporation and Elmer J. Jonnet, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed the judgment of the United States District Court for the Western District of Pennsylvania granting summary judgment against petitioners and awarding attorney's fees and expenses against petitioners.

JURISDICTION

Petitioners seek a writ of certiorari to review the judgment (1a) of the United States Court of Appeals for the Third Circuit on January 30, 1984. The judgment affirmed the granting of summary judgment against petitioners and the awarding of counsel fees and expenses against petitioners entered in the United States District Court for the Western District of Pennsylvania.

No petition for rehearing was filed in the United States Court of Appeals for the Third Circuit.

The United States Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Civil Procedure 15(a) provides:

"Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time

before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Federal Rule of Civil Procedure 41(a)(2) provides:

"Rule 41. Dismissal of Actions

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

STATEMENT OF THE CASE

A. Procedural History

Petitioner Jonnet Development Corporation filed this antitrust action in the district court against Consolidated Rail Corporation (Conrail), its chief executive officer, Edward Jordan, the Mayor of Pittsburgh, numerous municipal officials, and several private developers.[1] The defendants' responsive pleadings denied Jonnet's claims. Defendants Conrail and Jordan also filed a counterclaim and affirmative defense that Jonnet had based its claims upon altered documents, constituting a fraud upon the Court and causing these defendants to incur monetary damages. The relief requested by these defendants included money damages, punitive damages, attorneys' fees and costs against the plaintiff.

Thereafter, beginning June 8, 1981, the trial court conducted a limited non-jury trial to determine the counterclaim prior to consideration of the plaintiff's antitrust claims. Although the defendants' fraud claim was legal in nature and concerned issues of fact common to plaintiff's legal claim for relief, the trial court denied Jonnet's requests for a jury trial of the counterclaim and all related issues. The court also denied Jonnet's motion to withdraw all requests for equitable relief.

After a three and one-half day non-jury trial on the counterclaim and affirmative defense, the trial court entered extensive findings of fact and conclusions of law, which included

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1. Suit was filed by plaintiff Jonnet Development Corporation. Thereafter, Elmer J. Jonnet, Jr., was named as defendant in the counterclaims filed by Conrail and Jordan. For the sake of simplicity, Jonnet Development Corporation and Elmer J. Jonnet, Jr., will be referred to as petitioners of "Jonnet" throughout this petition, except where identification of the original plaintiff is appropriate.

the determination that Elmer Jonnet had testified falsely in this case and that the federal court action was based upon a document which had been materially altered.

The district court's denial of injunctive relief and plaintiff's request for a jury trial were appealed to the United States Court of Appeals for the Third Circuit. *Jonnet Development Corporation v. Caliguiri,* No. 81-2182.

On February 16, 1982, a judgment order was entered in No. 81-2182 affirming the judgment of the district court. On October 4, 1982, the United States Supreme Court denied Jonnet's petition for writ of certiorari from the judgment of the Third Circuit (S. Ct. No. 81-2274).

The previous appellate proceedings focused upon the procedure adopted by the district court and not the lower court's findings of fact. On January 25, 1983, an opinion and order was filed by the district court granting the defendants' motions for summary judgment on the legal aspects of the complaint (24a). Furthermore, summary judgment was entered in favor of Conrail on its counterclaim against Jonnet Development Corporation and Elmer J. Jonnet, Jr. The district court, by its order of January 25, directed that a hearing would be held on February 7, 1983, relative to the damages to be awarded Conrail and to consider the claims of Conrail, Jordan and any other party for counsel fees, expenses and costs. Following receipt of various applications for attorneys' fees and expenses the district court made findings of fact and conclusions of law on February 14, 1983, granting judgment on behalf of Consolidated Rail Corporation and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., in the sum of $598,327.81 on the counterclaim (14a). On February 15, 1983, the district court filed a memorandum and order granting the defendants' motions for counsel fees, costs and expenses in the total amount of $91,342.08 (5a).

Timely motions for a new trial and for amendment of judgment were filed by Jonnet on February 24, 1983. On February 28, 1983, Jonnet's post-trial motions were denied (3a). On March 28, 1983, a timely notice of appeal from the district court's final judgment of February 28, 1983, was filed by petitioners.

On January 30, 1984 the Court of Appeals affirmed the orders of the district court (1a). This petition for writ of certiorari seeks review of the January 30, 1984 judgment of the Court of Appeals.

B. Factual History

Jonnet Development Corporation is a Pennsylvania corporation engaged in the business of land development. On July 1, 1980, the company, through its President, Elmer J. Jonnet, Jr., made a $2.5 million bid to purchase from Conrail the Pennsylvania Railroad Station ("Penn Station") located in downtown Pittsburgh's "Golden Triangle." The parties had executed a prior sale agreement in January 1980, at which time Jonnet submitted a down payment of $100,000. This agreement was never finalized. Jonnet's deposit was not returned for six months while Conrail considered the company's offer.

Jonnet's bid of July 1, 1980, was the highest unconditional bid made on the property. The owners of the property, Consolidated Rail Corporation, entered into an agreement of sale for the property with Elmer Jonnet, Jr. Conrail officials delivered a set of keys to the property to Mr. Jonnet and the Jonnet company then undertook certain repairs and other expenses with regard to the restoration and development of Penn Station.

The July 1, 1980, agreement was reached during a lengthy meeting held at the offices of Conrail. Mr. Jonnet attended the meeting and executed Conrail's standard form agreement of sale at that time. The agreement stated in pertinent part that it was

"subject to the approval of Conrail's senior management and Board of Directors."

Subsequently, officials of the City of Pittsburgh, including Mayor Richard Caliguiri, initiated communications with senior Conrail personnel resulting in an agreement of Conrail to sell the property to the City of Pittsburgh and the Pittsburgh Urban Redevelopment Authority, and Conrail's management withheld approval of the Jonnet contract.

Jonnet Development Corporation instituted this civil action on March 18, 1981, against 22 defendants, alleging a conspiracy to restrain construction of a hotel by plaintiff in the Penn Station complex. Plaintiff also instituted several state court actions in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking specific performance, declaration of a constructive trust and money damages.

In the federal action, Jonnet sought equitable relief including the voiding of the agreement of sale between Conrail and the Urban Redevelopment Authority of Pittsburgh ("the Authority"), and an injunction prohibiting the conveyance of the Penn Station property to the Authority.

On May 26, 1981, a hearing took place before District Court Judge Donald E. Ziegler. At that time, the court reviewed the counterclaim and answer which had been filed by defendants Conrail and Edward G. Jordan, Conrail's former chairman. As an affirmative defense, the answer stated:

> As more fully set forth in the counterclaim hereto, Jonnet's claims in this action are founded upon a forged document which constitutes a fraud upon the court.

Conrail contended that Jonnet's reliance on a forged document was a fraud upon the court, since Jonnet knew of the forgery and filed suit in bad faith.

On June 4, 1981, the district court conducted a second status conference. After determining that plaintiff was seeking equitable relief prior to consideration by a jury of its claims for antitrust damages, the court decided to hear evidence commencing on June 8 concerning the defense of Conrail that Jonnet had knowingly filed suit in bad faith and was relying upon a forged document.

After several days of hearings, the district court determined that Conrail had presented clear and convincing evidence that the agreement dated July 1, 1980, had been materially altered. The court also determined that the fraud had been intentionally perpetrated by plaintiff and its President Elmer Jonnet, who signed the relevant documents and that Elmer Jonnet had testified falsely regarding matters related thereto. The district court thereafter denied plaintiff's request for equitable relief.

Plaintiff appealed, presenting issues related to the denial of its request for a jury trial on the issues of fact determined by the district court. The Court of Appeals by judgment order dated February 16, 1982, affirmed the district court's judgment. On October 4, 1982, the Supreme Court denied Jonnet's petition for writ of certiorari.

Meanwhile, the action proceeded in the district court.

Extensive discovery took place including the submission of various requests for documents, requests for admissions, and the taking of numerous depositions. Summary judgment motions were also filed on behalf of various parties.

On June 21, 1982, defendants Conrail and Jordan filed a motion to add Elmer Jonnet as a counter-defendant on the counterclaim attached to their answer. On August 10, 1982, Judge Ziegler granted their request. Conrail-Jordan moved for summary judgment on the counterclaim. The counterclaim defendants, Jonnet Development Corporation and Elmer J. Jonnet, Jr., filed a cross-motion for summary judgment on the counterclaim in which they likewise alleged fraudulent activity on the part of the defendants relating to the alleged conspiratorial undertaking to deprive Jonnet of the benefit of his Penn Station contract.

Without benefit of a hearing on the merits, Judge Donald Ziegler filed an opinion and order of court on January 25, 1983, therein (1) resolving the defendants' motions for summary judgment on the antitrust claims, granting all such motions; (2) granting Conrail's motion for summary judgment as to liability on its counterclaim against Jonnet. Thereafter, Judge Ziegler awarded counsel fees and expenses against Jonnet.

REASONS FOR GRANTING THE WRIT

1. The refusal of the district court to allow withdrawal of plaintiff's equitable claims in June, 1981, with resultant enhancement of damages awarded on the counterclaim in February, 1983, constituted such a clear departure from correct standards under applicable rules of federal civil procedure that an important question of federal law is presented in this petition.

2. The failure of the trial court to apply the "American Rule" respecting the awarding of counsel fees against petitioners in this case presents an important question of federal law.

I.

The district court, in this civil action, incorrectly calculated damages on the counterclaim where such calculation was premised on the pendency of certain equitable claims, where the district court had refused to allow withdrawal of such equitable claims shortly after institution of suit.

By oral motion to the Court, and by written motion, Jonnet's trial counsel attempted to withdraw its request for equitable relief no later than June 8, 1981; the district court refused to allow the withdrawal of this claim (36a).

Jonnet's attempt to withdraw the equitable claim must be analyzed under Rules 15 and Rule 41(a) of the Federal Rules of Civil Procedure.

Rule 15 of the Federal Rules of Civil Procedure provides that a request for amendment of pleadings is addressed to the discretion of the Court, and that "leave of court shall be freely given when justice so requires." *Id.* The courts have shown a strong liberality in allowing amendments under Rule 15(a). *See Heyl and Patterson International, Inc. v. F.D. Rich Housing,* 663 F. 2d 419, 425 (3d Cir. 1981), *cert. denied,* 455 U.S. 1018 (1982).

The interpretation and application of Rule 15 was reviewed by the United States Supreme Court in *Foman v. Davis,* 371 U.S. 178, 83 S. Ct. 227 (1962). There, the Supreme Court observed:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be

> a proper subject of relief, it ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the rules."

Id., 371 U.S. at 182, 83 S. Ct. at 230. *Accord, Skehan v. Board of Trustees of Bloomsburg State College,* 590 F. 2d 470 (3d Cir. 1978), *cert. denied,* 444 U.S. 832 (1979).

Of course, the trial court's discretion under Rule 15 "must be tempered by considerations of prejudice to the non-moving party, for undue prejudice is 'the touchstone for the denial of leave to amend.' " *Heyl and Patterson, supra,* 663 F. 2d at 425.

Based upon these controlling standards of law, we respectfully submit the district court's decision of June 8, 1981, denying plaintiff's request to amend its complaint by withdrawal of the claim for equitable relief was patently erroneous and raises an important question of federal law.

The only stated reason for the district court's refusal to deny Jonnet allowance to withdraw its request for equitable relief, which

withdrawal was to be *with prejudice,* was the desire of the district court to hear evidence on the counterclaim filed by Conrail with respect to a possible fraud upon the court. Notwithstanding the merits of that counterclaim, which issue was resolved in favor of Conrail, this rationale cannot support the denial of Jonnet's claim, particularly in light of the severe consequences that flowed from that decision.

The district court was not without jurisdiction to hear evidence on the counterclaim and could have proceeded to do so while simultaneously granting Jonnet's request to withdraw all prayers for injunctive relief. Had the district court exercised an informed discretion, rather than perfunctorily denying plaintiff's request, the "cloud on the title" which Conrail was unable to convey to the Urban Redevelopment Authority would never have existed. The hundreds of thousands of dollars of damages determined by the district court would never have been incurred. There would have been no delay in the conveyance of the property from Conrail to the Authority. The district court found that the pendency of Jonnet's equitable claims, not the legal claims, was the basis of the refusal of one title company to issue clear title to the Penn Station complex. In this case, the only prejudice to be suffered from the denial of Jonnet's request was prejudice to Jonnet; had the motion been granted, the defendants would have suffered no prejudice and, indeed, would have enjoyed substantial benefit from the district court decision.

Bad faith may constitute a proper justification for the denial of leave to amend. That justification does not apply in this case. The bad faith determined by the district court, namely, the institution of a federal court action based upon a materially altered document, is not to be equated with the bad faith governing a district court's decision under Rule 15. Jonnet's offer to withdraw its claim for equitable relief was not made in bad faith and no party has ever suggested that it was.

The failure of the district court to exercise an informed discretion, and to demonstrate "careful consideration" of the factors governing Rule 15 motions, warrants a reversal of the district court's decision in this case. *See Skehan v. Board of Trustees of Bloomsburg State College, supra,* 590 F. 2d at 492. Allowance of amendments to complaints in antitrust litigation is particularly appropriate and especially proper. *Penn Galvanizing Company v. Lukens Steel Company,* 65 F.R.D. 80 (E.D. Pa. 1974).

In this case, the district court awarded almost $700,000 in damages and counsel fees on defendants' counterclaim due largely to the fact that Jonnet's equitable claim was pending from June 15, 1981, until resolution of the appeal by the Third Circuit on March 15, 1982 (and subsequent closing on April 29, 1982). The record clearly demonstrates that all of the damages flowing from the "pendency" of Jonnet's equitable claim could have been obviated by the district court on June 8, 1981, had it exercised informed discretion and granted the request to withdraw Jonnet's claim for equitable relief.

The same conclusion follows if Jonnet's request is viewed in light of the provisions of Rule 41 of the Federal Rules of Civil Procedure. Rule 41(a)(2) refers to the voluntary dismissal of an "action" by plaintiff. Such motions for dismissal are addressed to the sound discretion of the trial court, which may impose conditions on the granting of such requests. *See Ockert v. Union Barge Line Corp.,* 190 F. 2d 303 (3d Cir. 1951); *accord, Ferguson v. Eakle,* 492 F. 2d 26, 28 (3d Cir. 1974). The question of the applicability of Rule 15 as compared to Rule 41(a) most often arises where a party attempts to withdraw its claims against some but not all parties. *See, e.g., Smith Kline & French Laboratories v. A.H. Robins Company,* 61 F.R.D. 24 (E.D. Pa. 1973); *Broadway & Ninety-Sixth Street Realty Corp. v. Loew's Inc.,* 23 F.R.D. 9 (S.D.N.Y. 1958). There is no doubt, however, that the

district court may exercise such power equitably and fairly, regardless of the specific provision of the rule which is relied upon. *Id.* at 11.

In considering a motion filed pursuant to Rule 41(a)(2), the district court may consider prejudice to the other party, the extent of the defendant's efforts and expenses already expended in preparation for trial, the possibility of excessive and duplicitous expense of defending a second action, and the sufficiency of the explanation for the need to take a dismissal. *See, e.g., Thomas v. Amerada Hess Corporation,* 393 F. Supp. 58 (M.D. Pa. 1975) *and cases cited therein.* In this case, as stated above, the matter of prejudice to the defendants could have been resolved easily as the district court action could have proceeded on the defendants' counterclaim. Secondly, the questions of expense should have been resolved in Jonnet's favor, that is, because the refusal of the plaintiff's request resulted in significant expense to the defendants which would have been prevented had the request for equitable relief been denied. Further, if the district court had been concerned with the expenses incurred by the defendants in substantial discovery proceedings prior to the non-jury trial, it could have conditioned the granting of the request by plaintiff on payment by plaintiff of defendants' litigation costs and attorneys' fees.

It has been said that a party seeking reversal of a district court's decision pursuant to Rule 41 must demonstrate "some plain legal prejudice flowing to them" as a result of that decision. *Hoffman v. Alside, Inc.,* 596 F. 2d 822, 823 (8th Cir. 1979). On the basis of this record, we respectfully submit that severe and plain "legal prejudice" has been suffered by the petitioners.

II.

By awarding counsel fees and expenses against petitioners the district court erroneously failed to apply the "American Rule" which generally disallows the assessment of attorneys' fees against a losing party in a civil litigation.

Although legal fees have been recoverable by successful litigants in the English courts for centuries, the traditional rule in the United States has disallowed such awards. *Mobil Oil Corp. v. Independent Oil Workers Union,* 679 F. 2d 299, 305 (3d Cir. 1982). *See generally,* Note, *Awards of Attorney's Fees in the Federal Courts,* 56 St. John's Law Review 277 (1982) (hereinafter "Note"). Formal recognition of the so-called "American Rule" may be traced to an 1869 decision of the United States Supreme Court, which held that a federal statute providing for the assessment of standardized costs was the exclusive vehicle for the recovery at law of attorney's fees. *See The Baltimore,* 75 U.S. (8 Wall) 377, 392 (1869). The federal courts, however, exercising inherent equity powers, have established two exceptions to the American Rule against recovery of legal fees.

The first exception to the American Rule, the so-called "common fund" exception, is not relevant to this case. *See generally,* Note, *supra,* at 280-81 and authorities cited therein.

The second exception to the American Rule, the "bad faith" exception, is punitive in nature, and enables a court to assess attorney's fees against a losing party who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Company v. United States,* 417 U.S. 116, 129 (1974) (citing *Vaughan v. Atkinson,* 369 U.S. 527, 530-31 (1962); *see Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975); *Straub v. Vaisman & Co.,* 540 F. 2d 591, 600 (3rd Cir. 1976).

However, the award of attorney's fees pursuant to the bad faith exception has been limited by the federal courts in several respects. Fees may be awarded only for those services necessitated by the vexatious conduct of the defeated party. *See, e.g., Richardson v. Communications Workers of American Local 7495,* 530 F. 2d 126, 133 (8th Cir.), *cert. denied,* 429 U.S. 824 (1976); *Wright v. Jackson,* 522 F. 2d 955, 957 (4th Cir. 1975); *Signal Delivery Service, Inc. v. Highway Truck Drivers and Helpers Local 107,* 68 F.R.D. 318, 322-23 (E.D. Pa. 1975).

Furthermore, because the bad faith exception is founded upon the inherent equitable powers of the federal courts, a court properly may refuse to award attorney's fees when the party requesting the award also has been guilty of misconduct. *See, e.g., In Re Kaid,* 347 F. Supp. 540, 543-44 (E.D. Va. 1972); *Lee National Corp. v. Kansas City Southern Industries, Inc.,* 50 F.R.D. 412, 415 (S.D.N.Y. 1970). *See generally,* Note, *supra,* at 281-82 and authorities cited therein.

It is clear that the mere resolution of issues against a party will not demonstrate the requisite degree of vexatiousness required for an award of attorney's fees. *Runyon v. McCrary,* 427 U.S. 160, 183 (1976). Indeed, fee shifting under the bad faith doctrine is justified only in exceptional circumstances. *See* Note, *supra,* at 284. A leading commentator has summarized these precepts in the following manner:

> "[The equitable power] is sufficiently broad that a federal district court may award attorney's fees in favor of one party and against another, where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons. But only in exceptional cases and 'for dominating reasons of justice' can the exercise of the power by the district court be justified."

G.J. Moore Fed. Prac., 54.77[2] at pages 1709-10 (2d Ed. 1982).

The lower court applied the bad faith exception and upheld an award of attorney's fees against petitioners in the case at bar. The lower court apparently justified its award on the basis of a "material alteration" of the July 1, 1980, agreement of sale. Judge Ziegler wrote: "Our decision is premised solely on the fact that Elmer Jonnet knowingly caused the defendants to devote considerable time and incur substantial expense in resisting a contrived and deceitful claim." (7a-8a).

It is noteworthy that the district court did not allow attorney's fees and expenses with respect to plaintiffs' legal claim, finding that, at the time the litigation was filed, Elmer Jonnet believed that a conspiracy existed to prevent him from developing a hotel in Pittsburgh's "Golden Triangle."

The district court's award, in its own words, was premised solely on the "time and expense" devoted to resisting Jonnet's equitable claim. That claim was filed on March 18, 1981. On June 8, 1981, Jonnet's written motion to withdraw the claim was denied by the district court. Yet nowhere in the analysis of the district court is reference made to the fact that the "time and expense" incurred was arguably capable of termination on June 8, 1981, rather than April 29, 1982.

Furthermore, petitioners submit that the findings of the district court, with respect to Elmer Jonnet's frame of mind and beliefs at the time he instituted this action, are inconsistent with the district court's determination of a "contrived and deceitful claim" and subsequent award of attorney's fees against Jonnet. The district court found that Mr. Jonnet believed that a conspiracy existed to deprive him of the right to develop a commercially attractive site within a very profitable area of the Pittsburgh marketplace. For this reason, requests by the various defendants for counsel fees on plaintiffs' legal theory of antitrust were denied.

It is clear that the cases in which attorney's fees have been upheld represent a limited exception to the American Rule.

Here, Judge Ziegler's opinion appears to blend the instances of bad faith which focus upon litigation conduct with conduct occurring prior to the litigation. The district court emphasized the importance of the materially altered document to the subsequent litigation wherein various defendants incurred time and expense in defending against Jonnet's equitable claims. This is to be contrasted, however, with the finding of the district court that the plaintiff Elmer J. Jonnet, Jr., believed that his case had merit when it was filed. Moreover, the district court expressly found "that from an objective standard the legal claim was not frivolous, unreasonable or without foundation." (7a).

It has been said that the underlying rationale of "fee shifting" is "punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Hall v. Cole,* 412 U.S. 1, 5, 93 S. Ct. 1943 (1973). But here Jonnet has been punished for filing a lawsuit which the district court determined was not frivolous; which the district court subsequently determined was based upon his sincerely held beliefs at the time the litigation was commenced; and in which the factual key to the district court's determination, namely, the equitable claim based upon a forged document, was the subject of a written motion to withdraw said claim which the district court denied in June 1981.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOHN ROGERS CARROLL
THOMAS COLAS CARROLL
CARROLL & CARROLL
Attorneys for Petitioners

APPENDIX A — JUDGMENT ORDER DATED JANUARY 30, 1984, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5231

JONNET DEVELOPMENT CORPORATION

Jonnet Development Corporation/Elmer J. Jonnet, Jr.,

Appellants

v.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MILTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN DEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL

On Appeal from the United States District Court for the Western District of Pennsylvania
(C. A. No. 81-0421)
(Honorable Donald E. Ziegler)

Appendix A

Submitted Under Third Circuit Rule 12(6)
January 24, 1984

Before: ADAMS, GARTH, *Circuit Judges*, and
BROTMAN, *District Judge**

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby afffirmed.

Costs taxed against appellants.

BY THE COURT,

s/ M. Adams
Circuit Judge
ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: Jan 30 1984

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* Hon. Stanley S. Brotman, United States District Court for the District of New Jersey, sitting by designation.

APPENDIX B—ORDER DATED FEBRUARY 28, 1983 UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (DENYING POST-TRIAL MOTION)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,

Defendants.

AND NOW, this 28th day of February, 1983,

IT IS ORDERED that the motion of Jonnet Development Corporation for summary judgment on the counterclaim of

Appendix B

Consolidated Rail Corporation a/k/a Conrail, and Edward G. Jordon be and hereby is denied.

IT IS FURTHER ORDERED that the motions of Jonnet Development Corporation and Elmer J. Jonnet, Jr., to alter or amend the judgments be and hereby are denied.

IT IS FURTHER ORDERED that the motions of Jonnet Development Corporation and Elmer J. Jonnet, Jr., for a new trial be and hereby are denied.

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Paul A. Manion, Esq.
Arthur J. Schwab, Esq.
D. R. Pellegrini, Esq.
Leonard M. Mendelson, Esq.
Robert M. Brown, Esq.
Joseph W. Conway, Esq.
John M. Feeney, Esq.
Stanley Yorsz, Esq.
Peter F. Dixon, Esq.
Michael R. Lemov, Esq.

APPENDIX C—MEMORANDA AND ORDER DATED FEBRUARY 15, 1983, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (AWARDING COUNSEL FEES AND EXPENSES)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,

Defendants.

Ziegler, District Judge

Presently before the court are the motions by various defendants for counsel fees and expenses. On January 27, 1983,

the court ordered that any party seeking to recover fees and expenses must delineate the time devoted to defense of plaintiff's legal claim and the time expended with respect to the equitable claim.

The reason is obvious. The equitable claim was based on a materially altered document, designed to prevent Conrail from conveying the property to the Urban Redevelopment Authority of Pittsburgh. Elmer J. Jonnet, Jr., knew that he had no enforceable agreement of sale when he sought to enjoin the conveyance by Conrail. To pursue an equitable claim with knowledge that it is groundless, and based on a forged document, is bad faith. Little more need be added. We find that the equitable claim of plaintiff was filed in bad faith, vexatiously, wantonly and for oppressive reasons. *See e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980); *Alyeska Pipeline Co. v. Wilderness Soc'y.,* 421 U.S. 240, 258-69 (1975).

On the other hand, the legal claim presents a more nettlesome problem. It is true that this court granted summary judgment following discovery. However, a finding that plaintiff failed to present a genuine issue of material fact does not establish that the legal claim was filed in bad faith. The American rule for over 200 years has provided that the prevailing party is not entitled to counsel fees. Absent bad faith, or statutory authorization, fees are not recoverable.

Although the question presents a close call, we hold that the legal claim of plaintiff was not filed in bad faith. Our ruling is based on the dealings between Elmer Jonnet and Conrail prior to the decision to convey the property to the Urban Redevelopment Authority, and the documents of record. It is possible to conclude, and we find that *plaintiff believed* that certain individuals desired

to prevent Jonnet from constructing a hotel at Pennsylvania Station, when the anti-trust claim was filed.

We wish to emphasize that this is the most that can be inferred concerning Elmer Jonnet's state of mind. Another hypothesis is possible. Most importantly, as we explained in our opinion of January 25, 1983, the facts established that plaintiff's suspicions were totally unfounded. First, Conrail had no interest in any particular use to which the property would be put. Second, Urban Redevelopment Authority had the right to designate the use to which the property would be put. And third, pre-trial discovery established beyond paradventure that plaintiff and Elmer Jonnet were not victims of an unlawful conspiracy.

We also find that from an objective standard the legal claim was not frivolous, unreasonable or without foundation. *Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1386-87 (3d Cir. 1982). Accordingly, the motions of defendants for counsel fees relative to the legal claim of plaintiff must be denied.

Before addressing the counsel fees that defendants may recover for defense of the equitable claim, we are constrained to comment upon the argument advanced by plaintiff's able and distinguished lawyer at the recent argument. Counsel urged the court to deny all fees due to the laudible efforts of Elmer Jonnet in certain unrelated matters. To do so however would be a grave injustice.

Our decision to award a portion of the fees claimed by defendants is not related to the considerable judicial effort that was expended in this case. Our decision is premised solely on the fact that Elmer Jonnet knowingly caused the defendants to devote considerable time and incur substantial expense in resisting a

contrived and deceitful claim. Indeed, even a cursory review of the pleadings and papers of record, supports this conclusion.

We have reviewed the motions of the parties for counsel fees relating to the equitable claim. The hours expended by counsel, the hourly rates and the amounts claimed are fair, reasonable and necessary. They were paid by the parties. We will enter judgment against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, because, as we have found, the only reasonable conclusion is that Elmer J. Jonnet, Jr., orchestrated the scheme.

Counsel fees for defense of the equitable claim will be awarded in the following sums to these parties:

(A) City of Pittsburgh for the reasonable value of services rendered by Dante R. Pellegrini, Esq.,——$12,984.00;

(B) Mondev International, Ltd., for fees paid to Buchanan, Ingersol, Rodewald, Kyle and Berger——$10,695.00;

(C) Urban Redevelopment Authority of Pittsburgh for fees paid to Eckert, Seamans, Cherin & Mellott——$18,505.50;

(D) Jack D. Buncher and The Buncher Company for fees paid to Hollinshead and Mendelson——$6,665.50;

(E) George Charlton for fees paid to Hollinshead and Mendelson——$6665.50;

(F) Hiram Milton for fees paid to Reed, Smith, Shaw & McClay——$19,198.50;

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(G) Ted Hardy for fees paid to Conway, Meyer and Cambest——$4,450.33. (We have allocated the sum of $1,000 to the legal claim of plaintiff); and

(H) No award will be made to Consolidated Rail Corporation due to our award of such fees in the counterclaim.

The claims of all parties for counsel fees for defense of the legal claim of plaintiff will be denied for the reasons previously discussed. However, the motions of defendants for recovery of costs and expenses must be granted whether they relate to either the legal or the equitable claim. Defendants have prevailed on all issues and the Court of Appeals has held that costs must be recovered in such cases absent exceptional circumstances. *Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1388 (3d Cir. 1982). No exceptional circumstances are present here and we conclude that such costs must include the expenses devoted to the defenses of both claims.

We will award the following costs and expenses to these parties:

(A) City of Pittsburgh	$ 790.03;
(B) Mondev International, Ltd.	$ 795.72;
(C) Urban Redevelopment Authority Pittsburgh	$5082.28;
(D) Jack D. Buncher and The Buncher Company	$ 896.60;
(E) George Charlton	$ 896.60;

Appendix C

(F) Hiram Milton	$1124.24;
(G) Ted Hardy	$ 145.03; and
(H) Consolidated Rail Corporation	$2572.25.

A separate judgment order will follow.

Dated: February 15, 1983

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Counsel of record.

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV-INTERNATIONAL OF MONTREAL,

Defendants.

ORDER OF COURT

AND NOW, this 15th day of February 1983,

IT IS ORDERED that the motions of defendants to add Elmer J. Jonnet, Jr., as a party to the claims of defendants for counsel fees, costs and expenses be and hereby are granted.

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IT IS FURTHER ORDERED that the motions of defendants for counsel fees with respect to the legal claim of plaintiff be and hereby are denied.

IT IS FURTHER ORDERED that the motions of defendants for counsel fees with respect to the equitable claim of plaintiff be and hereby are granted.

IT IS FURTHER ORDERED that the motions of defendants for costs and expenses with respect to the legal and equitable claims of plaintiff be and hereby are granted.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of the City of Pittsburgh and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $13,774.03.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Mondev International, Ltd., and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $11,490.72.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Urban Redevelopment Authority of Pittsburgh and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $23,587.78.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Jack D. Buncher and The Buncher Company and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $7562.10.

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IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of George Charlton and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $7562.10

IT IS FUTHER ORDERED that judgment be and hereby is entered on behalf of Hiram Milton and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $20,322.74.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Ted Hardy and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $4,595.36.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Consolidated Rail Corporation, a/k/a Conrail, and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $2,572,25.

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Counsel of record.

APPENDIX D — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS DATED FEBRUARY 14, 1983, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (GRANTING SUMMARY JUDGMENT TO CONRAIL ON COUNTERCLAIM)

IN THE UNITES STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,

Defendants.

Findings of Fact and Conclusions of Law With Respect to the Counterclaim of Consolidated Rail Corporation, a/k/a Conrail and Edward G. Jordan

Appendix D

Ziegler, District Judge

(1) Jonnet Development Corporation (JDC) filed a civil action for money damages and equitable relief against 22 defendants for alleged violation of the Sherman Act, 15 U.S.C. §1, *et seq.* (1976) and the Clayton Act, 15 U.S.C. §15 (1976);

(2) Consolidated Rail Corporation, a/k/a Conrail, and Edward G. Jordan filed an answer and counterclaim in which they denied all liability to plaintiff and further averred that the action was vexatious, filed in bad faith and based on fraudulent documents;

(3) The court granted expedited discovery at the behest of JDC and plaintiff urged also that the equitable claim be addressed at the earliest possible time by the court due to the execution of an agreement of sale whereby Conrail agreed to convey the Pennsylvania Station to the Urban Redevelopment Authority of Pittsburgh for the sum of $2,750,000;

(4) The parties to the agreement of sale agreed by letter dated August 20, 1980 that the closing would take place on or before June 30, 1981. *See* Defendants' Exhibit No. 1;

(5) The court entered findings of fact and conclusions of law on June 16, 1981 denying the claim of plaintiff for equitable relief due to fraud, perjury and unclean hands;

(6) Plaintiff appealed the order denying the claim for equitable relief to the United States Court of Appeals for the Third Court and that Court affirmed the order of the district court by judgment order dated February 16, 1982. Rehearing was denied on March 15, 1982 and the United States Supreme Court denied the petition for certiorari;

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(7) On August 10, 1982, the court granted the motion of Conrail and Jordan to add Elmer Jonnet as a counterdefendant on the counterclaim.

(8) On January 25, 1983, an opinion was filed and an order entered granting the motion of defendants for summary judgment on all claims of plaintiff and also granting the motion of Conrail and Jordan for partial summary adjudication as to liability on their counterclaim against JDC and Elmer J. Jonnet, Jr.;

(9) A bench trial was held on February 7, 1983 relative to the damages claimed by the counterclaimants;

(10) The court finds that Conrail and Jordan have established by clear and convincing evidence[1] that Conrail agreed to convey the Pennsylvania Station to the Urban Redevelopment Authority of Pittsburgh (URA) by agreement dated January 30, 1981;

(11) Conrail and the URA agreed that the closing would take place on or before June 30, 1981;

(12)Conrail and the URA agreed that the consideration would be $2,750,000 with $100,000 in earnest money being paid on January 30, 1981 and the sum of $2,650,000 to be paid at closing;

(13) The equitable claim of plaintiff constituted a cloud on the title;

---

1. All elements of fraud including the element of damage, must be proved by clear and convincing evidence under federal and state law. *Monsanto Co. v. Rohm v. Haas Co.*, 456 F.2d 592 (3d Cir. 1972); *Scaife Co. v. Rockwell-Standard Co.*, 446 Pa. 280, 285 A.2d 451 (1972). Since Conrail has met this burden, we need not address whether the lesser burden of preponderance of the evidence has any application to this counterclaim.

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(14) The Commonwealth Land Title Insurance Company refused to insure the title and issue an indemnification contract due to the pendency of plaintiff's equitable claim to void the agreement of sale and enjoin Conrail from conveying the real estate to the URA;

(15) The refusal of the Commonwealth Land Title Insurance Company to insure the title and issue an indemnification contract continued until the order of the United States Court of Appeals for the Third Circuit dated March 15, 1982 denying plaintiff's petition for rehearing;

(16) The closing was held and title was conveyed to the URA on April 29, 1982 for the sum of $2,750,000;

(17) The URA paid to Conrail $2,500,000 at the closing because an additional $100,000 had been paid by the purchaser "on account" on October 27, 1981 and $50,000 on March 10, 1982;

(18) The closing would have taken place on June 30, 1981 but for the pending equitable claim of plaintiff;

(19) The equitable claim of plaintiff constituted a cloud on the title, including during the appellate process, because neither Conrail nor the URA could obtain the necessary title guarantee until plaintiff's appeal was resolved by the Court of Appeals, despite due diligence by these parties;

(20) Conrail and the URA acted expeditiously in scheduling the closing and conveying title to the purchaser on April 29, 1982, which we find to be a reasonable period following the judgment of the Court of Appeals;

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(21) Conrail and Jordan have established by clear and convincing evidence that Conrail sustained actual damages from June 30, 1981 to April 29, 1982 for delay, loss of the use of $2,750,000, interest, and the expense relative to taxes that were paid in the period following the proposed closing of June 30, 1981;

(22) Conrail has established by clear and convincing evidence that it earned the following interest rates on investments during the relevant time period:

June 30, 1981 - July 31, 1981:	17.41%
July 31, 1981 - August 31, 1981:	17.56%
August 31, 1981 - September 30, 1981:	16.03%
September 30, 1981 - October 31, 1981:	14.26%
October 31, 1981 - November 30, 1981:	12.95%
November 31, 1981 - December 31, 1981:	12.47%
December 31, 1981 - January 31, 1982:	13.00%
January 31, 1982 - February 28, 1982:	13.50%
February 28, 1982 - March 31, 1982:	13.97%
March 31, 1982 - April 30, 1982:	14.05%
April 30, 1982 - May 31, 1982:	14.00%
May 31, 1982 - June 30, 1982:	13.78%

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June 30, 1982 - July 31, 1982:	12.53%
July 31, 1982 - August 31, 1982:	10.30%
August 31, 1982 - September 30, 1982:	9.97%
September 30, 1982 - October 31, 1982:	9.69%
October 31, 1982 - November 30, 1982:	9.33%
November 30, 1982 - December 31, 1982:	9.34%
December 31, 1982 - January 31, 1983:	9.08%

(23) Conrail has established by clear and convincing evidence that, based on the controlling rates of interest, it sustained a loss of investment income on a compounded basis of $144,419.40 from June 30, 1981 to October 27, 1981;

(24) Conrail has established by clear and convincing evidence that, based on the controlling rates of interest, it sustained a loss of investment income on a compounded basis of $131,887.01 from October 28, 1981 to March 10, 1982;

(25) Conrail has established by clear and convincing evidence that, based on the controlling rates of interest, it sustained a loss of investment income on a compounded basis of $53,555.71 from March 11, 1982 to April 29, 1982;

(26) Conrail has established by clear and convincing evidence that it was required to pay the following real estate taxes for the Pennsylvania Station, which it would not have paid otherwise, to the City of Pittsburgh, Pittsburgh School District and County of Allegheny:

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(A) June 30, 1981 - December 31, 1981	-$62,206.75
(B) January 1, 1982 - March 31, 1982	-$24,525.21
(C) April 1, 1982 - April 29, 1982	-$8,175.08
Total	$94,907.04

(27) Conrail has established by clear and convincing evidence that, based on the controlling rates of interest, it sustained a loss of investment income on a compounded basis of $17,026.42 as a result of payment of the real estate taxes set forth in the previous finding;

(28) Conrail has established by clear and convincing evidence that it sustained actual damages in the nature of counsel fees and expenses in the prosecution of this counterclaim and in defense of the claim for equitable relief;

(29) The court has reviewed the motion, supporting affidavits and attachments and we find by clear and convincing evidence that the hours expended by counsel, the hourly rates and to total sums paid are fair, reasonable and related to the prosecution of the counterclaim and the defense of the equitable claim;

(30) We will award to Conrail the sum of $135,109.50 for counsel fees and the sum of $16,422,73 for expenses related to the prosecution of the counterclaim and the defense of the equitable claim;

(31) We also find that the institution and prosecution of the equitable claim by JDC and Elmer J. Jonnet, Jr., was willful,

vexatious and in bad faith. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980); *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-69 (1975);

(32) Conrail will be awarded the sum of $5,000 for exemplary and punitive damages because the rehearsed conduct was intentional, outrageous, malicious and willful, and solely designed to interfere with a prospective business opportunity of the railroad;

(33) The actual damages sustained by Conrail were immediately and proximately caused by the equitable claim of plaintiff which in turn was based on the intentional acts, fraud, perjury and unclean hands of JDC and Elmer J. Jonnet, Jr.;

(34) Conrail has established by clear and convincing evidence that it sustained actual damages in the total sum of $598,327.81 and therefore judgment will be entered on behalf of Conrail and against JDC and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $598,327.81.

(35) Edward G. Jordan has failed to establish by any legal standard, i.e., clear and convincing evidence or preponderance of the evidence that he sustained any actual damages.

(36) The court incorporates the findings of fact and conclusions of law dated June 16, 1981; and

(37) A separate judgment order will follow.

DATED: February 14, 1983

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s/Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT I URCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,

Defendants.

Appendix D

ORDER OF COURT

AND NOW, this 14th day of February 1983,

IT IS ORDERED that judgment be and hereby is entered on behalf of defendant, Consolidated Rail Corporation, a/k/a Conrail, and against Jonnet Development Corporation and Elmer J. Jonnet, Jr., jointly and severally, in the sum of $598,327.81 on the counterclaim.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of Jonnet Development Corporation and Elmer J. Jonnet, Jr., on the counterclaim of Edward G. Jordan.

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Counsel of record

APPENDIX E—OPINION AND ORDER DATED JANUARY 25, 1983, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,

Defendants.

Ziegler, District Judge

Presently before the court are the motions of defendants to dismiss the complaint of Jonnet Development Corporation

(Jonnet) and for summary judgment. Since discovery has been completed, and all issues have been addressed by affidavit or otherwise, we will treat all motions pursuant to Rule 56. The motions of defendants for summary judgment will be granted.

I. History of Case

Jonnet filed a civil action for money damages alleging that defendants conspired to prevent plaintiff from acquiring property known as the Pennsylvania Station (Penn Station) in Pittsburgh, Pennsylvania. Plaintiff allegedly planned to construct a hotel on the site. The complaint alleges a conspiracy in violation of various sections of the Sherman Act, 15 U.S.C. §1*et seq.* (1976) and plaintiff seeks treble damages, counsel fees and costs under the Clayton Act. 15 U.S.C. §15.

Jonnet intitially sought equitable relief to prevent Consolidated Rail Corporation (Conrail) from conveying title to the property to the Urban Redevelopment Authority of Pittsburgh (U.R.A.) for valuable consideration. A hearing was held, and relief was denied due to fraud, perjury and unclean hands. The order of the district court was affirmed by the Court of Appeals, No. 81-2128 (3d Cir. Feb. 16, 1982), and the Supreme Court denied certiorari. ____ U.S. ____ (1982). The real estate has since been conveyed to the U.R.A. for the sum of $2,750,000.

Defendants now contend that the district court's adjudication with respect to Jonnet's claim for equitable relief is disposite of plaintiff's claim for money damages. Defendants rely upon the concept of claim preclusion based on fraud on the court, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1943), fraud on the parties, unclean hands and perhaps res judicata. While defendants approach is appealing, we believe that the

interests of justice require the court to address plaintiff's claims on the merits.

A.

We are first required to determine whether, viewing the evidence and inferences in a light most favorable to plaintiff, there is a genuine issue of material fact that some of all of the defendants agreed to restrain trade unreasonably. Summary judgment should be used sparingly in anti-trust cases but Rule 56 is still viable. *Harold Friedman, Inc. v. Kroger,* 581 F.2d 1068 (3d Cir 1978). Plaintiff makes no claim that defendants' conduct constituted a *per se* restraint of trade and thus the rule of reason is applicable. Hence under section 1 of the Sherman Act, plaintiff must prove the following elements:

> (1) [T]hat the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competative effects within relevant product and geographic markets; (3) that the objects of any and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978), *Fleer Corp. v. Topps Chewing Gum, Inc.,* 658 F.2d 139, 147 (3d Cir. 1981). Failure to prove any one of the elements is fatal. *Martin B. Glauser,* 570 F. 2d at 81. We find no evidence from which this court can infer that the first element of the claim has been satisfied.

Plaintiff contends that Conrail refused to approve plaintiffs' offer to purchase the Penn Station for $2,500,000 "for the sole

reason that the defendants and several of them preferred a previously approved plan of development for the general area which provided that a hotel would be built on the property immediately adjacent to the newly constructed Pittsburgh Convention Center." Amended pre-trial statement of plaintiff at 3. According to Jonnet, its planned hotel would complete with the hotel adjacent to the Convention Center and defendants' prevailed upon Conrail to reject plaintiff's offer to accommodate the U.R.A. and the redevelopment plan of the City of Pittsburgh.

The weakness in plaintiff's contention is that there is no evidence, direct or circumstantial, that Conrail, or its Chairman, conspired with anyone. The company made a unilateral business decision to sell the property to the U.R.A. for $2,750,000. The offer exceeded plaintiff's offer by $250,000 but more importantly, Conrail viewed the decision to be in its best interest to accommodate the Authority. The decision was not made to control the use to which the property would be put because Conrail had no interest in any particular development. We view nothing illegal in the Chairman's apparent desire to accommodate the Authority since it is a reasonable corporate interest to maintain a harmonious relationship with the public sector whenever possible and the Authority had the power to acquire the property by eminent domain, if it desired. In short, we find no evidence from which an inference can be drawn that Conrail or its Chairman conspired with anyone to prevent Jonnet Development Corporation from purchasing the Penn Station property or conspired with anyone to prevent the construction of a hotel at the site.

Edward T. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980) teaches that unilateral action, no matter what its motivation, is not violative of section 1 of the Act. To establish concerted action, there must be "a conscious commitment to a

common scheme designed to achieve an unlawful objective." *Id.* at 110-111. Here there is no evidence that the alleged participants had a unity of purpose; or a common design; or a meeting of the minds. Conrail's decision was unilateral because it was free to sell the property to anyone, and all offers were subject to approval of the board. Second, assuming *arguendo* that the U.R.A. was a competitor of plaintiff, as an owner, Conrail was free to sell the real estate to any competitor, or none at all. *Fleer Corp. v. Topps Chewing Gum,* 658 F.2d at 153. And third, there is no evidence that Conrail had an interest in preventing the construction of a hotel at the site, even if we assume that the U.R.A. intended such a result when it purchased the parcel. We hold that Jonnet Development Corporation has failed to adduce any evidence that Conrail or its Chairman engaged in any concerted action to achieve an unlawful objective.

B.

Plaintiff's theory of an illegal conspiracy against the City of Pittsburgh, Richard S. Caliguiri, Mayor's Development Council and its members (Charlton, Hardy and Milton), and the Urban Redevelopment Authority of Pittsburgh and its members (Caliguiri, Matter, Brophy, DeLuca, Gaetano, George, Hayllar, Lurcott, and Robin), is also without merit. First, if Conrail had the right to sell the property to anyone, it is difficult to conceptualize that these defendants could combine to form an agreenent in violation of the federal anti-trust laws. Second, there is insufficient evidence in this record that these defendants engaged in concerted action in violation of the Sherman Act. Third, assuming *arguendo* a contract, combination or conspiracy, "roughly translated to mean 'concerted action'," *Edward J. Sweeney & Sons, Inc. v. Texaco, supra* at 111, plaintiff has failed to demonstrate any evidence of unlawful objective.

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Caliguiri, Matter, Brophy, DeLuca, Gaetano, George, Hayllar, Lurcott and Robin, as members of the U.R.A., the City of Pittsburgh and Charlton, Hardy and Milton, as members of the Mayor's Development Council, correctly point out that the Sherman Act is inapplicable to restrain a state, its officers or agents, from activities authorized by the legislature. *Parker v. Brown,* 317 U.S. 341 (1943). In *Community Communications Co., Inc., v. City of Boulder,* ____ U.S. ____ (1982), the Supreme Court held that the precept of state action immunity is applicable when (1) the activities constitute the action of the state as a sovereign, or (2) the activity constitutes municipal action in furtherance of a clearly articulated and affirmatively expressed state policy. *See also, City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978).

The General Assembly of Pennsylvania specifically granted to the U.R.A. certain powers, 35 Pa.C.S.A. §1701, to be exercised as an agency of the Commonwealth. 35 Pa.C.S.A. §1709. Among those powers is the authority to purchase real property from any corporation for the purpose of redevelopment in blighted areas. 35 Pa.C.S.A. §1709(h).

Penn Station is located in an area designated by the City Planning Commission as Redevelopment Area No. 46. At all times, the Authority had the power to either purchase the property or acquire it by eminent domain as part of the redevelopment plan. Obviously, if the power to acquire by eminent domain is beyond the reach of the Sherman Act, the acquisition of real estate by purchase cannot be an unlawful objective.

The same delegation of legislative power is granted to the City under the Urban Development Law as an integral part of the planning and redevelopment process. 35 Pa.C.S.A. §1703(f).

We find that these functions are particularly municipal functions in furtherance of a clearly articulated policy of the Commonwealth of Pennsylvania, and private competition has been displaced. *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Plaintiff's argument that state action immunity is inapplicable here because the Urban Redevelopment Law does not apply when private enterprise may undertake a project is without merit. The fact that Jonnet Development Corporation desired to develop one building within a designated area does negate the municipal responsibility to determine whether a particular area is blighted and then proceed with a general plan of development. If accepted, plaintiff's argument would mean that municipal redevelopment of an area is proscribed any time a private developer plans to refurbish one structure within the entire area. That was clearly not the intent of the General Assembly when it enacted the Urban Redevelopment Law. 35 Pa.C.S.A. §1702. To the contrary, the Legislature granted to the redevelopment authorities the power to make policy decisions and then proceed with "the replanning and redevelopment of such areas in accordance with sound and approved plans for their redevelopment [to] promote the public health, safety, convenience and welfare." 35 Pa.C.S.A. §1702(a).

The state action immunity of *Parker* is controlling and the City of Pittsburgh, Mayor's Development Council, the U.R.A., and their members, had the power to determine the area to be redeveloped, the plan for development, the use to which the Penn Station would be put, and the location and number of hotels in the area.

C.

Jonnet has argeed to dismiss Grant-Liberty Development Group, a/k/a Hilton International from this civil action and the

parties have exchanged mutual releases. Counsel for plaintiff also stated at oral argument that he is unaware of any evidence that Hiram Multon or Ted Hardy were members of any alleged conspiracy. Judgment will therefore be entered for those defendants. The only remaining defendants to consider within the context of plaintiff's claim of concerted illegal activity is The Buncher Company, Jack G. Buncher, Mondev-Buncher Station Association and Mondev International.

As we understand the facts, the Mondev-Buncher Station Association planned to purchase the Penn Station from the U.R.A. and the Buncher Company and Mondev-International planned to develop the property as an office complex. Plaintiff alleges that they were co-conspirators but there are no facts to support the contention. Plaintiff refers to a meeting on August 22, 1980, without more. Amended pre-trial statement of plaintiff at 7. The relevance of that meeting is unclear and it provided no proof of membership in a conspiracy. It is not illegal to purchase and develop real estate consistent with a general plan of redevelopment established by an agency for that purpose. We hold that there is an absence of a genuine issue of material fact that these parties were members of a conspiracy in violation of federal law and therefore summary judgment must be granted.

In sum, we find that Jonnet Development Corporation has failed to present any evidence against any of the defendants from which this court can infer that defendants contracted, combined or conspired among each other, and plaintiff has failed to establish that the object of and conduct pursuant to the alleged conspiracy were illegal. Plaintiff has failed to satisfy either the first or third elements of the cause of action under the test of *Martin B. Glauser v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). We need not reach the question of whether

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Jonnet has defined the relevant market under either sections 1 or 2 of the Sherman Act. *See Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 148 n. 13 (3d Cir. 1981).

Our finding that Jonnet has produced no evidence demonstrating a conspiracy is also dispositive of plaintiff's claim based on section 2 of the Act. That claim is grounded solely on the alleged conspiracy. There is no evidence that defendants conspired to monopolize and therefore the section 2 claim, the remaining anti-trust allegations, if any, and the Clayton Act claim must be denied. We also find no evidence that defendants, or any of them, illegally attempted to monopolize or illegally monopolized the hotel space in any relevant market. Judgment shall be entered on behalf of the defendants and against Jonnet Development Corporation.

D.

The final issue that we must resolve is whether Conrail and Jordan are entitled to partial summary adjudication as to liability on their counterclaim against Jonnet Development Corporation and Elmer J. Jonnet, Jr. We answer that question in the affirmative. The counterclaim is based on defendants' contention that they incurred damages, expenses and costs due to inequitable conduct of plaintiff in pursuing the claim for equitable relief previously discussed. This court's findings are disposite by virtue of res judicata on the issue of liability and we will set a trial date in the future to hear evidence concerning the damages allegedly incurred by Conrail and Jordan.

A written order will follow.

Appendix E

s/ Donald E. Ziegler
United States District Judge

DATED: January 25, 1983

cc: Counsel of record

UNITED STATES COURT OF APPEALS
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MILTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MODEV INTERNATIONAL OF MONTREAL,

Defendants.

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ORDER OF COURT

AND NOW, this 25th day of January, 1983, in accordance with the accompanying opinion.

IT IS ORDERED that the motions of defendants, Richard S. Caliguiri, David Matter, Paul Brophy, George Charlton, Ed DeLuca, Louis Gaetano, Steve George, Ted Hardy, Ben Hayllar, Robert Lurcott, Hiram Multon, John Robin, City of Pittsburgh, Urban Redevelopment Authority of Pittsburgh, Consolidated Rail Corporation, a/k/a Conrail, Edward G. Jordan, The Buncher Company, Jack G. Buncher, Mondev-Bucher Station Association and Mondev International of Montreal for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that the motion of defendants, Consolidated Rail Corporation and Edward G. Jordan, for summary judgment as to liability on their counterclaim be and hereby is granted against Jonnet Development Corporation and Elmer J. Jonnet, Jr.

IT IS FURTHER ORDERED that, pursuant to the agreement of the parties, the claim of plaintiff against Grant-Liberty Development Group, a/k/a Hilton International be and hereby is dismissed.

IT IS FURTHER ORDERED that a hearing shall be held on February 7, 1983, at 10 a.m. relative to the counterclaim for damages of Conrail and Jordan and the claim, if any, of any other party for counsel fees, expenses or costs.

Donald E. Ziegler
United States District Judge

Appendix E

cc: Paul A. Manion, Esq.
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APPENDIX F—ORDER DATED JUNE 8, 1981, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (DENYING PLAINTIFF'S MOTION TO WITHDRAW REQUEST FOR EQUITABLE RELIEF)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-421

JONNET DEVELOPMENT CORPORATION,

Plaintiff,

vs.

RICHARD S. CALIGUIRI, et al.,

Defendants.

AND NOW, to-wit, this 8th of June, 1981, it is hereby ORDERED and DECREED that Plaintiff's Motion to Withdraw its Request for Equitable Relief is denied.

BY THE COURT:

s/ Donald E. Ziegler
United States District Court Judge

(2)

No. 83-1766

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JONNET DEVELOPMENT CORPORATION AND ELMER J. JONNET, JR.,

Petitioners,

v.

RICHARD S. CALIGUIRI, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Respondents In Opposition To Petition

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THIS CASE PRESENTS NO CONSTITUTIONAL OR SUBSTANTIAL FEDERAL QUESTIONS APPROPRIATE FOR REVIEW AND MERELY RAISES FACTUAL MATTERS RELATING TO DAMAGES WHICH ARE FULLY SUPPORTED BY THE RECORD AND WERE THE SUBJECT OF A PREVIOUS UNSUCCESSFUL PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the Third Circuit's summary affirmance of the award of counterclaim damages resulting from petitioner's fraud, forgery and perjury in the prosecution of this action where no constitutional or substantial federal questions are presented and the issues merely are factual in nature and were the subject of a previous unsuccessful petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

This is the second occasion on which Jonnet Development Corporation and Elmer J. Jonnet, Jr. (collectively "Jonnet" or "petitioner")[1] have petitioned this Court for a writ of certiorari in this action. The factual determinations of the district court which form the basis of the present petition were unsuccessfully challenged in Jonnet's previous appeal and petition. The statement of the case set forth in the petition, however, does not adequately address this fact and otherwise misstates or fails to state various critical factual and procedural matters. Respondents Consolidated Rail Corporation and its former chairman, Edward G. Jordan (collectively "Conrail"), believe these matters require denial of the petition and, accordingly, have summarized them as follows:

In addition to the present action, petitioner also filed several related actions in the Court of Common Pleas of Allegheny County, Pennsylvania against Conrail and certain other respondents. Petitioner's filing of this action and the companion state court actions placed a cloud on Con-

[1]Elmer J. Jonnet, Jr., the controlling officer and shareholder of Jonnet Development Corporation, was joined as a defendant on the counterclaim by Order dated August 10, 1982. (C.A. Supp. App. at 21) That joinder has not been challenged and, accordingly, no distinction is made herein between the two petitioners.

rail's title to the Pennsylvania Railroad Station property which prevented its transfer for redevelopment purposes to the Urban Redevelopment Authority of the City of Pittsburgh. (C.A. App. at 130a-131a)

Conrail defended against the equitable claims in this action by asserting that petitioner was acting in bad faith and in reliance upon a fraudulent sales agreement. At the commencement of the June 8, 1981 evidentiary hearing pursuant to Fed.R.Civ.P. 42(b) concerning the limited issue of the bad faith and fraud defenses of Conrail, petitioner moved to withdraw its request for equitable relief in an attempt to prevent or at least delay an adjudication of its fraudulent conduct. Despite several requests, petitioner refused to likewise withdraw its equitable claims in the related state court actions. This refusal necessarily would have had the effect of continuing the cloud on Conrail's title even in the event the equitable claims in the present federal action were withdrawn. Conrail and the other respondents refused to consent to the motion for withdrawal because of their belief that a finding by the district court of fraudulent conduct could be used (by operation of collateral estoppel) to obtain a dismissal of the state court actions and, thereby, clear Conrail's title. (C.A. App. at 106a; 113a-118a) In recognition of both the substantial prejudice that would be caused to the respondents if petitioner were permitted to delay a determination of its fraud and also the serious questions raised concerning petitioner's alleged affront to the integrity of the judicial process, the district court denied the motion to withdraw and ordered that the hearing proceed. (C.A. App. 128a-129a)

At the conclusion of the evidentiary hearing, the district court found by clear and convincing evidence that the purported sales agreement relied upon by petitioner in support of its equitable claims contained intentional and

fraudulent alterations and that petitioner had provided false testimony under oath in furtherance of that fraud. Because of petitioner's unclean hands and fraudulent conduct, the district court by Order dated June 16, 1981 denied all its claims for equitable relief. (C.A. App. at 130a-155a) Petitioner filed an appeal (No. 81-2182) from the district court's June 16, 1981 ruling to the United States Court of Appeals for the Third Circuit and argued, *as it does again now in its present petition*, that the district court abused its discretion in refusing to grant its last-minute request to withdraw the equitable claims. The Third Circuit denied the appeal and upheld the district court's actions and rejected petitioner's assertion that the ruling in question resulted in a non-jury determination of its fraudulent conduct in alleged violation of its right to a jury trial. (C.A. Supp. App. at 103-104) Petitioner then filed with this Court a petition for a writ of certiorari (No. 81-2274) which likewise challenged the district court's exercise of discretion in refusing to permit withdrawal of its equitable claims. That petition was denied by Order dated October 4, 1982. (C.A. Supp. App. at 105)

Proceedings then continued in the district court on the remaining issues of petitioner's antitrust claim for damages and Conrail's counterclaim for damages resulting from the wrongful and fraudulent prosecution of this action. By Order dated January 25, 1983, the district court granted Conrail's motion for summary judgment as to liability on its counterclaim and granted summary judgment in Conrail's favor with respect to petitioner's antitrust damage claim. (Pet. for Cert. at 33a-35a) Petitioner does not contest these summary judgment awards.

At an evidentiary hearing on February 7, 1983, Conrail proved its counterclaim damages by clear and convincing evidence. These damages were established by means of

facts stipulated to by the parties as well as verified testimony and evidence which petitioner did not attempt to contest or rebut. (C.A. Supp. App. at 22-28)

By Order dated February 14, 1983, the district court awarded Conrail its counterclaim damages which included, *as an element of damage and not as a matter of the court's discretion*, reimbursement of legal fees and expenses incurred in the defense of petitioner's equitable claims. (Pet. for Cert. at 22a-23a) The United States Court of Appeals for the Third Circuit granted summary affirmance by Order dated January 30, 1984 of that damage award to Conrail. (Pet. for Cert. at 1a-2a)[2] Jonnet's present petition seeks review of that summary affirmance.

ARGUMENT

THIS CASE PRESENTS NO CONSTITUTIONAL OR SUBSTANTIAL FEDERAL QUESTIONS APPROPRIATE FOR REVIEW AND MERELY RAISES FACTUAL MATTERS RELATING TO DAMAGES WHICH ARE FULLY SUPPORTED BY THE RECORD AND WERE THE SUBJECT OF A PREVIOUS UNSUCCESSFUL PETITION FOR A WRIT OF CERTIORARI.

The petition essentially requests that this Court review the record to determine whether sufficient factual

[2]The February 14, 1983 Order also awarded punitive damages to Conrail in the amount of $5,000 which certainly is reasonable in light of the egregiousness of Jonnet's fraudulent conduct and which Jonnet does not contest in its petition.

By separate Order dated February 15, 1983 (Pet. for Cert. at 11a-13a), the district court awarded attorneys' fees to certain of the other respondents but not to Conrail since Conrail had received reimbursement of those fees as an element of damage on its counterclaim. Accordingly, Jonnet's present challenge on the basis of the so-called "American Rule" to the February 15, 1983 award of attorneys' fees to certain respondents has no application whatsoever to the district court's February 14, 1983 Order reimbursing Conrail for certain legal fees and expenses.

support exists for certain rulings affecting damages which petitioner concedes were matters within the discretion and equitable powers of the district court. Petitioner does not claim that the district court impaired its constitutional rights, applied incorrect or even disputable legal standards, or otherwise took action raising substantial federal questions of general application which traditionally have been the subject matter deemed suitable for this Court's review. The present request that this Court second-guess the district court with respect to its fact determinations simply is inappropriate, especially since the same matters were involved in Jonnet's previous unsuccessful petition for a writ of certiorari.

Petitioner's primary argument is that there was insufficient factual support for the district court's exercise of its discretion in denying petitioner's last-minute motion to withdraw its claims for equitable relief. As described in detail in the counterstatement of the case, that denial was required to avoid undue prejudice to Conrail and the other respondents because of petitioner's repeated refusals to likewise dismiss its equitable claims in companion state court litigation. Permitting petitioner to avoid or delay an adjudication of its fraud by withdrawing its equitable claims on the eve of trial simply would have continued the cloud on Conrail's title to the Pennsylvania Railroad Station property.

The detriment and prejudice to the parties and the public resulting from further delay of the transfer and redevelopment of the property in question provided sufficient basis for the denial of petitioner's motion to withdraw. Indeed, the denial of the motion was compelled under the authority relied upon by petitioner, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and the controlling precedent of the Third Circuit, *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d

Cir. 1974), which establish that the bad faith of the moving party and the prejudice to the opposing party are the dispositive considerations in ruling upon such a motion. Moreover, the district court had the inherent power (despite the desires of any of the parties) to order that the evidentiary hearing proceed because petitioner's fraud in the prosecution of this action constituted an affront to the integrity of the court's own processes. *E.g., Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Gaudiosi v. Mellon*, 269 F.2d 873 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).

Even if there were any merit to its argument—which there is not—petitioner should not be permitted to again challenge the denial of the motion to withdraw as that ruling was the subject of Jonnet's previous unsuccessful appeal and petition to this Court. Petitioner then claimed that the district court's supposed abuse of discretion in denying the motion to withdraw resulted in a non-jury determination of the fraud issue which allegedly deprived petitioner of its constitutional right to jury trial. Although petitioner's previous challenge raised constitutional questions not involved in the present petition, its prior appeal was unsuccessful and its petition for a writ of certiorari was denied. Petitioner should not be entitled to renew its unsuccessful attack on the district court's denial of its motion to withdraw simply because it now chooses to characterize that same ruling as affecting the damages awarded rather than its jury trial rights as previously asserted. *Cf., Arizona v. California*, 103 S.Ct. 1382 (1983); *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 103 S.Ct. 58 (1982).

Petitioner's second argument that there is insufficient factual support for the district court's awarding of attorneys' fees to certain of the respondents likewise has no

merit. The district court expressly found by clear and convincing evidence at the conclusion of the hearing held in June of 1981 that petitioner was guilty of fraud, forgery, and perjury in the prosecution of its equitable claims. Those findings were upheld on petitioner's previous appeal with respect to which this Court refused to grant a writ of certiorari. The district court reaffirmed those matters in its February 14, 1983 Findings and Conclusions and expressly found that the "institution and prosecution of the equitable claim [by petitioner] was willful, vexatious, and in bad faith . . . [and was] solely designed to interfere with the prospective business opportunity of [Conrail]." (Pet. for Cert. at 20a-21a) Such express factual findings by the district court certainly justify the discretionary award of attorneys' fees to the respondents under the so-called "American Rule" standards cited by petitioner.

Even in the absence of such factual findings, however, the award of attorneys' fees to Conrail would be proper. The district court's award to Conrail by Order dated February 14, 1983 of reimbursement of certain attorneys' fees was done as an element of damage on the counterclaim and not as a matter of the district court's discretion. Petitioner does not contest that reimbursement of such fees is a proper element of damage on the counterclaim. The amount of counterclaim damages awarded to Conrail was established by means of uncontested or stipulated proof and, accordingly, even the amount of such damages cannot now be meaningfully challenged by petitioner.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Counsel for Respondents, Consolidated Rail Corporation and Edward G. Jordan

Dated: May 30, 1984

RULE 28.1 CERTIFICATE

Respondent Consolidated Rail Corporation advises the Court pursuant to Rule 28.1 that it has no parent company and that it owns stock in the following subsidiaries (except wholly-owned subsidiaries) or affiliates:

The Akron and Barberton Belt Railroad Company
Albany Port Railroad Company
The Belt Railway Company of Chicago
Calumet Western Railway Company
The Canada Southern Railway Company
Chicago and Western Indiana Railroad Company
Fruit Growers Express Company
Indiana Harbor Belt Railroad Company
The Lakefront Dock and Railroad
Terminal Company
The Monongahela Railway Company
The Niagara River Bridge Company
(a wholly-owned subsidiary of
The Canada Southern Railway Company)
Nicholas, Fayette and Greenbrier Railroad Company
Peoria and Pekin Union Railway Company
Pittsburgh, Chartiers Youghiogheny
Railway Company
Railbox Company
(a wholly-owned subsidiary of
Trailer Train Company)
Railgon Company
(a wholly-owned subsidiary of
Trailer Train Company)
Trailer Train Company
Trailer Train Finance N.V.
(a wholly-owned subsidiary of
Trailer Train Company)